

89-978

(1)

Supreme Court, U.S.
FILED

DEC 11 1989

JOSEPH F. SPANIOLO, JR.
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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL VON RUECKER,
Petitioner,

vs.

HOLIDAY INNS, INC., RICHARD L. FOWLER,
TOWERS HOTEL CORPORATION, and MADESCO
MANAGEMENT CORPORATION,
Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

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QUESTIONS PRESENTED

Section 537.053 RSMo. requires that in order for a civil action for damages to be brought by an injured minor against a liquor licensee for selling intoxicating liquor to the minor, the liquor licensee must have been convicted or received a suspended imposition of sentence as a result of selling the intoxicating liquor to the minor. In this case the prosecuting attorney, acting with the police, required the injured minor to give a statement and confession to the police before charges against the liquor licensee would be considered.

The question presented is whether Section 537.053 RSMo. unconstitutionally violates such an injured minor's right against self-incrimination and right to due process of the law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

The parties to this proceeding are Petitioner, Michael Von Ruecker, and Respondents Holiday Inns, Inc., Richard L. Fowler, Towers Hotel Corporation and Madesco Management Corporation.

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**PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

The Petitioner, Michael Von Ruecker, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Missouri Court of Appeals, Eastern District, entered in the above-captioned case on June 27, 1989.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Eastern District, is reported as *Von Ruecker v. Holiday Inns, Inc.*, 775 S.W.2d 295 (Mo.App.1989), and is reprinted in the Appendix hereto.

There was no opinion issued by the St. Louis City Circuit Court, only an order sustaining Respondents' Motions to

Dismiss Petitioner's Petition for Damages and dismissing Petitioner's Petition for Damages. Said order is reprinted in the Appendix.

JURISDICTION

The procedural history is as follows. On December 16, 1987, Petitioner filed his Petition for Damages. On July 29, 1988, the St. Louis City Circuit Court entered an order sustaining Respondents' Motions to Dismiss Petitioner's Petition for Damages and dismissing Petitioner's Petition for Damages. On August 5, 1988, Petitioner timely filed his Notice of Appeal to the Missouri Court of Appeals, Eastern District. On June 27, 1989, the Missouri Court of Appeals, Eastern District, filed an opinion and order affirming the judgment of the St. Louis City Circuit Court. On August 1, 1989, the Missouri Court of Appeals, Eastern District, denied Petitioner's timely Motion for Rehearing and/or Transfer to the Missouri Supreme Court. On September 12, 1989, the Missouri Supreme Court denied Petitioner's timely Application for Transfer to the Missouri Supreme Court.

In the St. Louis City Circuit Court, Missouri Court of Appeals, Eastern District, and Missouri Supreme Court, Petitioner raised the question of whether Section 537.053 RSMo. is repugnant to the Fifth and Fourteenth Amendments to the United States Constitution. The St. Louis City Circuit Court and the Missouri Court of Appeals, Eastern District, ruled that Section 537.053 RSMo. is not repugnant to the United States Constitution.

The Missouri Supreme Court, the highest Court of the State of Missouri, declined to hear the case. Accordingly, the Missouri Court of Appeals, Eastern District, was the highest Court of the State of Missouri in which a decision could be had.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

STATUTES

Section 537.053 states as follows:

1. Since the repeal of the Missouri Dram Shop Act in 1934 (Laws of 1933-34, extra session, Page 77), it has been and continues to be the policy of this state to follow the common law of England, as declared in Section 1.010, RSMo., to prohibit dram shop liability and to follow the common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons.
2. The legislature hereby declares that this section shall be interpreted so that the holdings in such cases as *Carver v. Schafer*, 647 S.W.2d 570 (Mo. App. 1983); *Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo. App. 1980); and *Nesbitt v. Westport Square, Ltd.*, 624 S.W.2d 519 (Mo. App. 1981) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages, rather than the furnishing of alcoholic beverages, to be the proximate cause of injuries inflicted upon another by an intoxicated person.
3. Notwithstanding subsections 1 and 2 of this section, a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises who, pursuant to Section 311.310, RSMo., has been convicted, or has received a suspended imposition of sentence arising from the conviction, of the sale of intoxicating liquor to a person under the age of twenty one (21) years or an obviously intoxicated person if the sale of such intoxicating liquor is the proximate cause of the personal injury or death sustained by such person.

Section 311.310 RSMo. states as follows:

Any licensee under this Chapter, or his employee, who shall sell, vend, give away or otherwise supply any intoxicating liquor in any quantity whatsoever to any person under the age of twenty one (21) years, or to any person intoxicated or appearing to be in a state of intoxication, or to a habitual drunkard, and any person whomsoever except his or her parent or guardian who shall procure for, sell, give away or otherwise supply intoxicating liquor to any person under the age of twenty one (21) years, or to any intoxicated person or any person appearing to be in a state of intoxication, or to a habitual drunkard, shall be deemed guilty of a misdemeanor; provided, however, that this section shall not apply to the supplying of intoxicating liquor to a person under the age of twenty one (21) years for medical purposes only, or the administering of said intoxicating liquor to any person by a duly licensed physician.

Section 311.325 RSMo. states as follows:

Any person under the age of twenty-one (21) years who purchases or attempts to purchase, or has in his possession, any intoxicating liquor as defined in Section 311.320 is guilty of a misdemeanor.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution states, in pertinent part, as follows:

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.....

The Fourteenth Amendment to the United States Constitution states, in pertinent part, as follows:

Section 1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner filed a Petition for Damages against Respondents in St. Louis City Circuit Court for negligence, intentional tort, products liability and breach of contract after suffering injuries in an alcohol-related automobile accident on December 18, 1986.

In his Petition for Damages, Petitioner alleged that Respondents served him intoxicating liquor when he was under the age of twenty-one (21) years and obviously intoxicated.

Respondents each filed a Motion to Dismiss the Petition for Damages, alleging that Petitioner failed to state a cause of action or claim upon which relief could be granted because Petitioner failed to allege that Respondents, pursuant to Section 311.310 RSMo., had been convicted or had received a suspended imposition of sentence for the sale of intoxicating liquor to a person under the age of twenty-one (21) years or to an obviously intoxicated person as required under Section 537.053 RSMo.

Petitioner filed Suggestions in Opposition to Respondents' Motions to Dismiss, arguing that Section 537.053 RSMo. is unconstitutional because it violates Petitioner's right against self-incrimination and right to due process of the law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. In support of his argument Petitioner referred to certain documents filed with his Suggestions in Opposition to Respondents' Motions to Dismiss which contain the following facts.

Petitioner and two (2) minor friends went to Respondents' tavern where they were served approximately five (5) or six (6)

pitchers of beer and a glass or more of whiskey over a period of approximately two and one-half hours. Petitioner, who had just turned nineteen (19) the month before, was served well past the point of intoxication to the extent that his blood alcohol content was .187 by weight several hours after consuming the intoxicating liquors. The bar was not crowded; only a few other customers were present, yet the bartender continued to serve Petitioner and made no effort to check Petitioner's identification.

After leaving Respondents' tavern, Petitioner lost control of his automobile and overturned it in a single car accident. As a result, Petitioner is and will remain a quadriplegic.

The liquor law violations committed by Respondents were reported by Petitioner's counsel to the St. Louis Circuit Attorney's office (the state's prosecuting attorney's office for St. Louis) within five (5) days of the violations. Petitioner's counsel was told that Petitioner and the two (2) minors he was with would have to appear at the St. Louis Metropolitan Police Station and give statements and confessions before the matter would be investigated further, and that the three (3) would be subject to arrest and prosecution for illegal possession of intoxicating liquor if they confessed to the offense, which they later did only so criminal charges against Respondents could be pursued.

George Peach, who has been the Circuit Attorney for St. Louis since 1977, testified in his deposition that he refused to prosecute Respondents, but if he would have, Petitioner would have had to testify. This is a normal requirement in a criminal prosecution of this nature because, according to Mr. Peach, an independent witness is usually not available.

In this case, no witnesses other than Petitioner and his two (2) minor friends were available to testify on the sale of intoxicating liquor to Petitioner and Petitioner's age.

Petitioner's constitutional argument was rejected by the St. Louis City Circuit Court as it sustained Respondents' Motions to Dismiss Petitioner's Petition for Damages and dismissed Petitioner's Petition for Damages on July 29, 1988. Petitioner's argument was raised again in his Brief and Reply Brief filed in the Missouri Court of Appeals, Eastern District, which also rejected the argument.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari because the decision of the Missouri Court of appeals decided a federal question involving the Fifth and Fourteenth Amendments to the United States Constitution in a way which conflicts with numerous applicable decisions of this Court as discussed herein.

Section 537.053 RSMo. clearly violates the Self-Incrimination Clause of the Fifth Amendment applicable to the State of Missouri by reason of the Fourteenth Amendment in that the effect of Section 537.053 RSMo. is to give an injured minor such as Petitioner the choice of either confessing to the misdemeanor offense of unlawful purchase or possession of intoxicating liquor in violation of Section 311.325 RSMo., or being barred from filing a civil action against the tavern to recover for his injuries. *Malloy v. Hogan*, 378 U.S.1 (1964).

While Section 537.053 RSMo. does not expressly require this choice, this is its effect, and in determining the constitutionality of a statute this Court concerns itself with its practical operation and potential impact in ascertaining whether constitutional rights have been denied. *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967); *American Oil Company v. Neill*, 380 U.S. 451, 455 (1965); *Oyama v. State of California*, 332 U.S. 633, 636 (1948).

The Missouri Court of Appeals held that Petitioner's waiver of his right against self-incrimination under these circumstances was voluntary as it was in furtherance of his efforts to secure convictions of Respondents. This holding conflicts with *Lefkowitz v. Turley*, 414 U.S. 70 (1973), where this Court held that a "waiver secured under the threat of substantial economic sanction cannot be termed voluntary." *Id.*, at 83-84.

The threatened loss of the opportunity to recover from Respondents was inherently coercive. *Lefkowitz v. Cunningham*, 431 U.S. 801, 807 (1977). Such potential economic benefits must be taken into account as this Court said in *Cunningham*:

“Prudent persons weigh heavily such legally unenforceable prospects in making decisions; to that extent, removal of those prospects constitutes economic coercion.” *Ibid.*; see *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967) (Where the choice is “between the rock and the whirlpool,” duress is inherent in deciding to “waive” one or the other.).

The Fourteenth Amendment secures against State invasion Petitioner’s right to remain silent “unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for such silence.” *Malloy v. Hogan*, 378 U.S.1, 8 (1964). Here, any refusal by an injured minor such as Petitioner to waive his right against self-incrimination leads automatically and without more to imposition of sanctions in violation of the Fourteenth Amendment. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805, 808 (Fn5) (1977). Petitioner was not offered immunity and none was available under Missouri law.

Section 537.053 RSMo., in effect, requires an injured minor such as Petitioner to go to law enforcement officials, confess to a violation of the law and provide the evidence to convict himself and the tavern, or have no possibility of recovering for his injuries. This in direct conflict with the American system of criminal justice which constitutionally compels governments, state and federal, to establish guilt by evidence independently and freely secured. *Malloy v. Hogan*, 378 U.S.1, 7-8 (1964).

The silent approach of Section 537.053 RSMo. is just as unconstitutional as any other. *Spevack v. Klein*, 385 U.S. 511, 515 (1967). To allow the State of Missouri to benefit from this approach would encourage governmental circumvention of our adversary system and erode the Fifth Amendment, the “essential mainstay” of our system of criminal justice. *Malloy v. Hogan*, 378 U.S.1, 7 (1964); see *The Conjurer’s Circle - The Fifth Amendment Privilege in Civil Cases*, 91 Yale L.J. 1062, 1110 (Fn186)-1111 (1982).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

**CERTIFICATE OF SERVICE ON THE ATTORNEY
GENERAL FOR THE STATE OF MISSOURI**

I hereby certify that a copy of Petitioner's Petition for Writ of Certiorari was deposited in a United States mailbox, with first-class postage prepaid, and properly addressed to Attorney General William L. Webster, Attorney General for the State of Missouri, P.O. Box 899, Jefferson City, MO 65102, this 11th day of December, 1989, for the reason that 28 U.S.C. Section 2403 (b) may be applicable.

/s/ John F. Mulligan, Jr.
Counsel for Petitioner

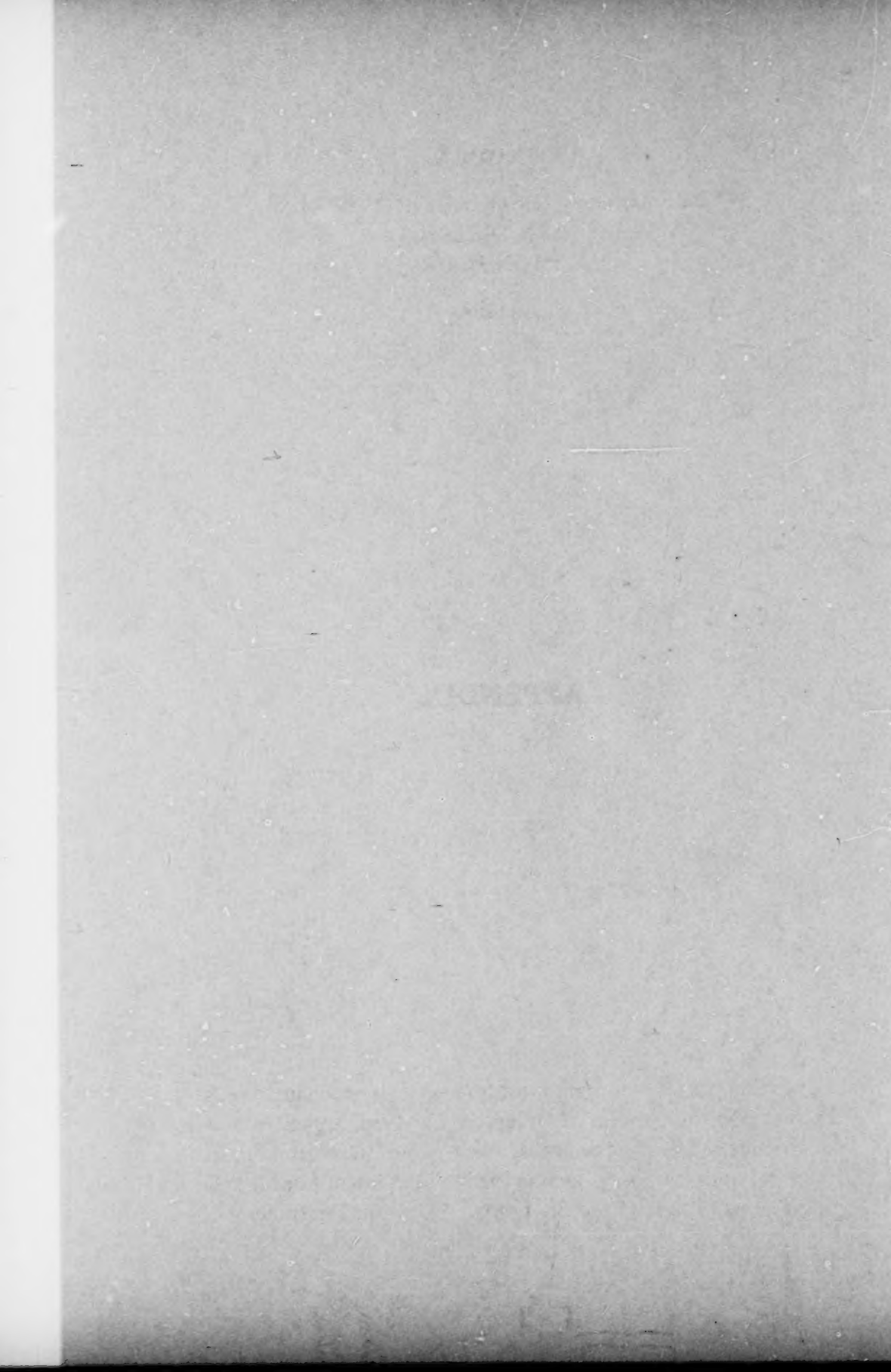
Subscribed and sworn to before me this 11th day of
December, 1989.

/s/ George F. Lestina
Notary Public

My Commission Expires:
January 10, 1992



APPENDIX



APPENDIX A

**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION FOUR**

No. 55288

**MICHAEL VON RUECKER,
Plaintiff-Appellant,**

vs.

**HOLIDAY INNS, INC., RICHARD L. FOWLER,
TOWERS HOTEL CORPORATION and
MADESCO MANAGEMENT,
Defendants-Respondents.**

**Appeal from the Circuit Court
of the City of St. Louis**

Hon. Brendan Ryan, Judge

OPINION FILED: June 27, 1989

Appellant brought an action against respondents for negligence, intentional tort, products liability and breach of contract after suffering injuries in an alcohol related automobile accident on December 18, 1986. Appellant alleged that he was served intoxicating liquor by respondents when he was under the age of twenty-one and obviously intoxicated. Each respondent moved to dismiss for failure to state a claim upon which relief could be granted. The trial court sustained respondents' motions on July 29, 1988. Appellant filed a timely appeal from this dismissal. We affirm.

The facts, viewed in a light most favorable to appellant, are as follows: On the evening of December 17, 1986, appellant and two friends, all under the age of twenty-one, were drinking in Jimbo's Lounge, a bar located in the Holiday Inn at Fourth and Pine Streets in the City of St. Louis. Later, on December 18,

1986, at approximately 2:30 a.m., appellant overturned his car in a single car accident. As a result, appellant is and will remain a quadriplegic.

On December 16, 1987, appellant filed a three count petition for damages against respondents Holidays Inns, Inc. and its employee Richard Fowler. The respondents filed separate motions to dismiss on the ground that appellant failed to state a cause of action because he failed to satisfy the conviction requirement of §537.053.3, RSMo. 1986. On March 3, 1988, the trial court heard and denied the motions, without prejudice so that appellant could make a record regarding the constitutionality of the statute. The trial court indicated in its order that respondents could renew their motions in sixty days.

Appellant deposed Circuit Attorney George Peach, Sgt. Roger Kohler, Officer Fred Hussman, Ms. Shirley McEwan (Custodian of Records for the St. Louis City Police Department) and William Torno (St. Louis District Supervisor, Division of Liquor Control). Appellant also submitted interrogatories and a request for production of documents to respondents. Answers and objections to appellant's discovery requests were filed on April 6, 1988. Respondents' objections were sustained by the trial court on April 21, 1988.

On April 19, 1988, the Supreme Court of Missouri handed down its opinion in the case of *Simpson v. Kilcher*, 749 S.W.2d 386. *Simpson* upheld the validity of §537.053 and rejected constitutional attacks premised on violations of the open courts doctrine, separation of powers, due process and equal protection, stating that, "where the plaintiff is a victim of drunk driving, the conviction of the liquor licensee is an element of plaintiff's right to sue, not an obstruction or bar to his right to sue." *Id.* at 389.

Appellant filed his First Amended Petition on June 15, 1988, in which he joined Towers Hotel Corporation and Madesco Management as additional defendants. He added a breach of

contract cause of action to his previous negligence, products liability and intentional tort actions on the theory that he was a third party beneficiary of Madesco's and Towers' contractual obligations to operate Jimbo's Lounge in an orderly and law abiding manner.

On July 13, 1988, separate motions to dismiss were filed on behalf of each respondent. The trial court heard and sustained these motions on July 29, 1988. This appeal followed.

In reviewing the trial court's dismissal of an action, we must determine if the facts pleaded and the inferences reasonably drawn therefrom demonstrate any ground for relief. We treat the facts averred as true, construe all averments liberally and favorably to appellant and determine whether the pleadings invoke principles of substantive law upon which relief may be granted. *Detling v. Edelbrock*, 671 S.W.2d 265, 267 (Mo. banc 1984).

In his first point, appellant asserts that the trial court erred in dismissing his petition because §537.053, RSMo 1986, is inapplicable to licensees who serve intoxicating liquor to obviously intoxicated minors. We first look to the statute in question.

1. Since the repeal of the Missouri Dram Shop Act in 1934 (Laws of 1933-34, extra session, page 77), it has been and continues to be the policy of this state to follow the common law of England, as declared in section 1.010, RSMo, to prohibit dram shop liability and to follow the common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons.

2. The legislature hereby declares that this section shall be interpreted so that the holdings in cases such as *Carver v. Schafer*, 647 S.W.2d 570 (Mo. App. 1983); *Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo. App. 1980); and *Nesbitt v. Westport Square, Ltd.*, 624 S.W.2d 519

(Mo. App. 1981) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages, rather than the furnishing of alcoholic beverages, to be the proximate cause of injuries inflicted upon another by an intoxicated person.

3. Notwithstanding subsections 1 and 2 of this section, a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises who, pursuant to section 311.310, RSMo, has been convicted or has received a suspended imposition of the sentence arising from the conviction, of the sale of intoxicating liquor to a person under the age of twenty-one years or an obviously intoxicated person if the sale of such intoxicating liquor is the proximate cause of the personal injury or death sustained by such person.

Missouri's former dram shop act, Section 4487, RSMo 1929, was repealed by the General Assembly in 1934. Questions concerning dram shop liability were then placed with the courts. There was no dram shop liability in Missouri after 1934 until the judiciary began chipping away at the concept in *Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo. App. 1980), and *Nesbitt v. Westport Square, Ltd.*, 624 S.W.2d 519 (Mo. App. 1981). These cases found that a violation of §311.310, RSMo, gave rise to a cause of action against tavern owners. Later, in *Carver v. Schafer*, 647 S.W.2d 570 (Mo. App. 1983), this court extended liability on purely common law concepts. *Carver* held that §311.310 is indicative of a public policy that everyone is required to take ordinary care against reasonably anticipated injuries. *Id.* at 575. The tavern owner has the same duty of care and, therefore, should have avoided supplying the patron with more intoxicating liquor once it was apparent that the patron was already intoxicated. *Id.*

All three cases were, however, abrogated by §537.053 which became effective on September 28, 1985. This statute is “a legislative prohibition of dram shop liability coupled with the creation of a new, limited cause of action. . . .” *Simpson v. Kilcher*, 749 S.W.2d 386, 390 (Mo. banc 1988). The statute is rationally justified in that the legislature made a policy decision to place responsibility on the drunk driver. *Id.* at 392. The former common law rule against dram shop liability has, therefore, been effectively reinstated except where there has been a conviction or suspended imposition of sentence.

Appellant’s first argument under this point is that §537.053 only applies to a cause of action brought by a third party. Section 537.053.2 specifically abrogates *Sampson v. W.F. Enterprises, Inc.*, *supra*, in which the Western District determined that the parents of a deceased minor, who had been served alcoholic beverages by two different tavern owners, stated a cause of action against the tavern owners when their son overturned his truck and was killed. The purpose of abrogating *Sampson*, *Carver* and *Nesbitt* in the statute was to “promote judicial efficiency . . . by preventing lawsuits against tavern owners every time a patron injures *himself, or another.*” *Simpson*, 749 S.W.2d at 392. (emphasis added) Since the facts in *Sampson* are very similar to the facts herein, and *Sampson* was abrogated, we find that §537.053 applies to first party as well as third party actions.

Appellant next argues that the legislature did not intend to prohibit intoxicated persons from recovering for their own injuries.¹ According to the plain language of subsections 1 and 2

¹ In support of this argument appellant cites the affidavit of his attorney which recounts a telephone conversation with a member of the Missouri State Senate who participated in the debates and lawmaking processes which resulted in the enactment of what is now §537.053. Whatever the recollection of the distinguished senator may be as to the legislative intent behind the statute, we disregard the affidavit as hearsay while noting, *infra*, that we are bound by what the statute says, not by what one legislator meant for it to say.

of §537.053, there is no dram shop liability. Subsection 3 creates a limited exception in favor of liability. *Andres v. Alpha Kappa Lambda Fraternity*, 730 S.W.2d 547 (Mo. banc 1987). Under this exception, liability exists only when the tavern owner has been convicted or received a suspended imposition of sentence pursuant to §311.310, RSMo, for the sale of intoxicating beverages to a person under the age of twenty-one or to an obviously intoxicated person, and then only if the sale of the intoxicating liquor is the proximate cause of the personal injury or death sustained by such person. §573.053.3, RSMo 1986. Absent such allegation, no cause of action is stated. *Simpson*, 749 S.W.2d at 389.

We are bound by express written law and not by what may or may not have been intended. *Pipe Fabricators, Inc. v. Director of Revenue*, 654 S.W.2d 74, 76 (Mo. banc 1983). We, therefore, find that the statute applies equally to intoxicated persons attempting to recover for their own injuries.

In his final argument under Point I appellant asserts that the conviction requirement in §573.053.3 violates his right against self-incrimination because it is necessary to expose himself to arrest and criminal prosecution by confessing to the offense of unlawful purchase or possession of intoxicating liquor in order to subject respondents to possible conviction.² A person can waive his right against self-incrimination as long as the waiver is voluntary, knowing and intelligent. *State v. Curry*, 714 S.W.2d 798, 800 (Mo. App. 1986).

As discussed above, conviction or suspended imposition of sentence of one who sells intoxicating liquor to a minor is a necessary element of the cause of action constructed by

² Section 311.325, RSMo 1986, provides: "Any person under the age of twenty-one years, who purchases or attempts to purchase, or has in his possession, any intoxicating liquor as defined in section 311.020 is guilty of a misdemeanor."

§537.053, but it does not follow that the testimony of the vendee is a prerequisite of the conviction. Clearly, others could testify to the fact of the sale and to the purchaser's age; and, therefore, the necessity of a conviction as an element of a cause of action allowed by §537.053 cannot be argued to invalidate the statute. The statements given by appellant to law enforcement authorities were in furtherance of his effort to secure convictions of the respondents and were unquestionably voluntary.

Point I is denied in its entirety.

In his second, third, fourth, fifth and sixth points, appellant argues that the trial court erred in dismissing his petition because he stated claims based on negligence, intentional tort, strict products liability, negligent products liability and breach of contract. We find that the statutory remedy is exclusive and since appellant was unable to state a cause of action under the statute his action is precluded.

It is a well established principle that when a statute creates a new right or liability that did not exist at common law or under prior statutes, and also provides a specific remedy for the enforcement thereof, that statutory remedy is exclusive. *Gales v. Weldon*, 282 S.W.2d 522, 529 (Mo. 1955). See also, *Schiles v. Gaertner*, 659 S.W.2d 791, 793 (Mo. App. 1983); *State ex rel. Slibowski v. Kimberlin*, 504 S.W.2d 237, 240 (Mo. App. 1973).

Section 537.053.3 created a limited cause of action where none previously existed. The statute expresses a legislative intent to shield tavern keepers from liability for the injuries caused by their drunken patrons unless the tavern keeper "pursuant to section 311.310, RSMo, has been convicted or has received a suspended imposition of the sentence arising from the conviction, of the sale of intoxicating liquor to a person under the age of twenty-one years or an obviously intoxicated person if the sale of such intoxicating liquor is the proximate cause of the personal injury or death sustained by such person." §537.053.3, RSMo 1986. This is a condition to the existence of a cause of

action. *Simpson*, 749 S.W.2d at 389. The condition is an element of the right, *State ex rel. Jewish Hospital of St. Louis v. Buder*, 540 S.W.2d 100, 104 (Mo. App. 1976), and becomes part of the right itself. *State ex rel. Slibowski*, 504 S.W.2d at 240.

In order to state a cause of action a plaintiff must allege the criminal conviction or suspended imposition of sentence. No such allegation was made here. The trial court was, therefore, correct in dismissing all counts in appellant's petition. Points II through VI are denied.

Appellant's seventh point states that the trial court erred when it dismissed his first amended petition because §537.053 is unconstitutional as applied to appellant. The argument under this point is a half page in length and cites no authority; it merely incorporates by reference a motion that was before the trial court. This is not sufficient. The point is deemed abandoned. *Boswell v. Steel Haulers, Inc.*, 670 S.W.2d 906, 912 (Mo. App. 1984); Rule 84.04(d). Moreover, our Supreme Court has already laid to rest appellant's constitutional challenges in *Simpson v. Kilcher*, *supra*. The point is denied.

Finally, appellant asserts the trial court erred when it sustained respondents' objections to appellant's interrogatories and requests for production of documents. Appellant's discovery was for the purpose of determining if respondents had *at any time* been convicted or received a suspended imposition of sentence for violating §310.311. Appellant filed and served interrogatories on respondents Holiday Inns and Richard Fowler on March 17, 1988. Respondents filed their objections on April 6, 1988, arguing that the information requested exceeded the scope of discovery. The trial court sustained these objections, and appellant claims that such ruling prevented him from stating a claim upon which relief could be granted in this case.

We find no error. It is clear there were no convictions, or for that matter charges, arising out of the present case. Other con-

victions or suspended impositions of sentence are of no consequence to the issue of whether a cause of action was stated in this case. To state a cause of action under §537.053.3 the conviction or suspended imposition of sentence must arise from “the sale of intoxicating liquor to a person under the age of twenty-one years or an obviously intoxicated person *if the sale of such intoxicating liquor is the proximate cause of the personal injury or death sustained by such person.*” (Emphasis added) Consequently, the point is denied.

The judgment of the trial court is affirmed.

/s/ Albert J. Stephan, Jr., Judge

Smith, P.J., Satz, J., concur

APPENDIX B

**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

TO: Attorney of Record

Page 2 of 3

FROM: Deirdre O. Ahr, Clerk

DATE August 1, 1989

**RE: MOTIONS FOR REHEARING AND/OR TRANSFER
TO SUPREME COURT DENIED**

- 13 55288 RUECKER, MICHAEL VON, APP.
 VS. HOLIDAY INNS, INC., ET AL., RESP.
- 14 55334 BALL, JOHN EDWARD, APP.
 VS. STATE OF MISSOURI, RESP.
- 15 55389 HARRELL, ALVIN REY, APP.
 VS. STATE OF MISSOURI, RESP.
- 16 55391 VOLLMER, BRADLEY, APP.
 VS. STATE OF MISSOURI, RESP.
- 17 55404 P, R. L IN THE INTEREST OF P, C, RESP.
- 18 55503 GOFORTH, JAMES A., APP.
 VS. STATE OF MISSOURI, RESP.
- 19 55534 COOPER, EUGENE L., APP.
 VS. STATE BOARD OF PHARMACY, RESP.
- 20 55574 JACKSON, JAMES ALLEN, APP.
 VS. STATE OF MISSOURI, RESP.
- 21 55575 HILL, EUGENE A., APP.
 VS. STATE OF MISSOURI, RESP.
- 22 55588 STOCKSTROM, CHARLES, T., RESP.
 VS. JOCOBY, RICHARD, ET AL., APP.
- 23 55613 HERRELL, ALVIN REY, APP.
 VS. STATE OF MISSOURI, RESP.

24 55679 BENNETT, WILLIAM R. APP.
VS. STATE OF MISSOURI, RESP.

APPENDIX C

IN THE SUPREME COURT OF MISSOURI

September Session, 1989

No. 71966

E.D. No. 55288

Michael Von Ruecker,

Plaintiff-Appellant,

vs. (TRANSFER)

Holiday Inns, Inc., et al.,

Defendants-Respondents.

Now at this day on consideration of Plaintiff-Appellant's Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1989, and on the 12th day of September, 1989, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 12th day of September, 1989.

/s/ Thomas F. Simon
Clerk

/s/ Kathleen Blanton
D.C.

APPENDIX D

**MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(St. Louis City)**

Division 1

No. 872-07176

Michael Von Ruecker

vs.

Holiday Inns, Inc.

MEMORANDUM FOR CLERK

(7/29/88)

Separate Motions to Dismiss of Defendants Holiday, Inns, Inc., Richard L. Fowler, Towers Hotel Corporation and Madesco Management Corporation called, heard and sustained. Plaintiff's Motion for a Protective Order is sustained as follows: Plaintiff's Deposition Exhibits E, G, H and L are ordered sealed for good cause shown. Plaintiff's First Amended Petition is hereby dismissed.

/s/ James E. Whaley

Atty for Defendants

GREIDER & MULLIGAN

By:/s/ John F. Mulligan, Jr.

225 S. Meramec, Suite 525T

Clayton, MO 63105

Attorneys for Plaintiff

SO ORDERED

/s/ Brendan Ryan

Judge

APPENDIX E

**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

No. 55288

MICHAEL VON RUECKER,
Plaintiff-Appellant,

vs.

HOLIDAY INNS, INC., RICHARD L. FOWLER,
TOWERS HOTEL CORPORATION and
MADESCO MANAGEMENT CORPORATION,
Defendants-Respondents.

Appeal from the Circuit Court
of the City of St. Louis

Hon. Brendan Ryan, Judge

**NOTICE OF APPELLANT'S FILING OF PETITION FOR
WRIT OF CERTIORARI IN THE
UNITED STATES SUPREME COURT**

COMES NOW Appellant by and through his attorneys,
Greider & Mulligan, and hereby gives notice that on this 11th
day of December, 1989, he mailed for filing in the United States
Supreme Court, a Petition for Writ of Certiorari.

GREIDER & MULLIGAN

By: _____
John F. Mulligan, Jr. #34431
Attorneys for Appellant
225 S. Meramec, Suite 525T
Clayton, MO 63105
(314) 727-8910

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this 11th day of December, 1989 to Mr. James E. Whaley, Attorney for Respondents, 705 Olive Street, Suite 1100, St. Louis, MO 63101, and the original was filed in the Missouri Court of Appeals, Eastern District, this 11th day of December, 1989.

/s/ John F. Mulligan, Jr.

No. 89-978⁽²⁾

Supreme Court, U.S.

FILED

JAN 10 1990

JOSEPH F. SPANIEL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL VON RUECKER,
Petitioner,

vs.

HOLIDAY INNS, INC., RICHARD L. FOWLER,
TOWERS HOTEL CORPORATION, and MADESCO
MANAGEMENT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari
to the Missouri Court of Appeals,
Eastern District

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

DONALD L. JAMES
BROWN, JAMES & RABBITT, P.C.
705 Olive Street, Suite 1100
St. Louis, Missouri 63101
(314) 421-3400

Counsel for Respondents

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No. 89-978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL VON RUECKER,
Petitioner,

vs.

HOLIDAY INNS, INC., RICHARD L. FOWLER,
TOWERS HOTEL CORPORATION, and MADESCO
MANAGEMENT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari
to the Missouri Court of Appeals,
Eastern District

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

**STATUTES AND CONSTITUTIONAL PROVISIONS
INVOLVED**

Statutes:

Section 537.053, R.S.Mo. 1986

1. Since the repeal of the Missouri Dram Shop Act in 1934 (Laws of 1933-34, extra session, page 77), it has been and continues to be the policy of this state to follow the common law of England, as declared in Section 1.010, R.S.Mo., to prohibit dram shop liability and to follow the

common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons.

2. The legislature hereby declares that this section shall be interpreted so the holdings in cases such as *Carver v. Schafer*, 647 S.W.2d 570 (Mo.App. 1983); *Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo.App. 1980); and *Nesbitt v. Westport Square, Ltd.*, 624 S.W.2d 519 (Mo.App. 1981) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages, rather than the furnishing of alcoholic beverages to be the proximate cause of injuries inflicted upon another by an intoxicated person.

3. Notwithstanding subsections 1 and 2 of this section, a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises who, pursuant to Section 311.310 R.S.Mo. has been convicted, or has received a suspended imposition of the sentence arising from the conviction, of the sale of intoxicating liquor to a person under the age of twenty-one years or an obviously intoxicated person if the sale of such intoxicating liquor is a proximate cause of the personal injury or death sustained by such person.

Constitutional Provisions:

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life

or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without the due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REASONS FOR DENYING THE PETITION

SUMMARY OF ARGUMENT

The question presented by petitioner is whether the application of Section 537.053, R.S.Mo. 1986, unconstitutionally violated his right against self-incrimination which is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Resolution of this question turns on an examination of the provisions of Section 537.053.

Section 537.053 is divided into three subsections. Subsection 1 sets forth the declaration of the Missouri General Assembly that dramshop liability is prohibited in Missouri. Subsection 2 legislatively abrogates three Missouri appellate decisions which created common-law dramshop liability. Subsection 3, the focus of petitioner's constitutional attack, creates a limited exception to the rules of non-liability established by subsections 1 and 2.

Under subsection 3, a cause of action for dramshop liability exists only when the dramshop keeper has been convicted or has received a suspended imposition of sentence. The Supreme Court of Missouri has held this requirement to be a condition precedent to the existence of a cause of action for dramshop liability. *Simpson v. Kilcher*, 749 S.W.2d 386, 389 (Mo. banc 1988). It is an element of the plaintiff's case. *Id.*

In the present case, the trial court dismissed petitioner's action and the Eastern District of the Missouri Court of Appeals affirmed because petitioner could not satisfy the conviction/suspended imposition of sentence requirement of subsection 3. Consequently, before this Court, petitioner seeks to invalidate subsection 3 of Section 537.053 on the ground that the statute violated his right against self-incrimination. In effect, petitioner seeks to prove Section 537.053 unconstitutional in order to pursue his cause of action.

Petitioner's constitutional challenge, however, must fail.

This Court need not consider petitioner's constitutional attack because he knowingly, intelligently, and voluntarily waived his right against self-incrimination by confessing to the unlawful possession of intoxicating liquor prior to his accident. According to petitioner's attorney, the purpose of this waiver was to initiate a criminal investigation against respondents.

Moreover, regardless of petitioner's waiver, his self-incrimination challenge nevertheless must fail. Implicit in his attack is the mistaken assumption that the Missouri General Assembly created a general cause of action for dramshop liability and then, by means of subsection 3, sought to illegally narrow it by requiring potential plaintiffs to waive their right against self-incrimination. On its face, subsection 3 does not compel self-incrimination. Nor does it follow as petitioner suggests that his testimony was absolutely necessary to satisfy the conviction/suspended imposition of sentence requirement.

Finally, subsection 3 is severable from subsections 1 and 2 of Section 537.053. Constitutional review of a statute requires a reviewing court to refrain from invalidating more of a statute than is necessary. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). In this case, subsections 1 and 2 constitute complete, constitutional, legislative enactments prohibiting dramshop liability. Consequently, this Court need not consider whether subsection 3 is constitutionally infirm because if subsection 3 is invalid, it is severable from subsections 1 and 2 which nonetheless bar petitioner's cause of action.

For these reasons, respondents respectfully request this Court to deny the Petition for Writ of Certiorari.

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE CONVICTION REQUIREMENT OF SUBSECTION 3 OF SECTION 537.053, R.S.Mo. 1986, DOES NOT VIOLATE PETITIONER'S RIGHT AGAINST SELF-INCRIMINATION FOR THE REASON THAT PETITIONER KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT AGAINST SELF-INCRIMINATION ON MAY 19, 1987.

Petitioner seeks a Writ of Certiorari from this Court to review the decision of the Eastern District of the Missouri Court of Appeals on the ground that Section 537.053, R.S.Mo. 1986, violated petitioner's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Specifically, petitioner contends that the conviction requirement of subsection 3 of Section 537.053, R.S.Mo. 1986, violated his right against self-incrimination because it exposed him to arrest and criminal prosecution by confessing to the offense of unlawful purchase or possession of intoxicating liquor in order to subject respondents to possible conviction. His Petition for a Writ of Certiorari, however, should be denied because petitioner waived his right against self-incrimination on May 19, 1987.

Constitutional jurisprudence recognizes that a person can waive fundamental constitutional rights. *United States v. Oliver*, 525 F.2d 731, 734-35 (8th Cir. 1975), *cert. denied*, 424 U.S. 973 (1976). This includes the right against self-incrimination. *Id.* To constitute an effective waiver of constitutional rights, the waiver must be voluntary, knowing, and intelligent. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

In the present case, petitioner waived his right against self-incrimination on May 19, 1987, when he confessed to the unlawful possession of intoxicating liquor. The record before the Eastern District of the Missouri Court of Appeals included the affidavit of petitioner's counsel. The affidavit

demonstrates, by inference, that petitioner's waiver of his right against self-incrimination was made on the advice of counsel. In particular, the affidavit states:

On May 19, 1987, Csongor Kozak, Mark Menendez and [petitioner] appeared at the St. Louis Metropolitan Police Station, waived their constitutional rights against self-incrimination and confessed to unlawfully possessing intoxicating liquor at the Holiday Inn on or about December 17, 1986. They waived their constitutional rights only because no criminal prosecution would be brought against [respondents] if they did not waive said rights.

Resp. App. A-2.

The record demonstrates that petitioner's statement to the police was voluntary. As found by the Eastern District of the Missouri Court of Appeals: "The statements given by [petitioner] to law enforcement authorities were in furtherance of his effort to secure convictions of the respondents and were unquestionably voluntary." Pet. App. A-7. Consequently, petitioner cannot challenge Section 537.053, R.S.Mo. 1986, on self-incrimination grounds and his Petition for a Writ of Certiorari should therefore be denied.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE CONVICTION REQUIREMENT OF SUBSECTION 3 OF SECTION 537.053, R.S.Mo. 1986, DOES NOT VIOLATE PETITIONER'S RIGHT AGAINST SELF-INCRIMINATION FOR THE REASON THAT THE PLAIN LANGUAGE OF THE STATUTE DOES NOT COMPEL SELF-INCRIMINATION.

A. STANDARD OF REVIEW

In determining whether certiorari should be granted in this case, where the constitutionality of Section 537.053, R.S.Mo.

1986, is at issue, this Court is guided by the principle that a statute, whenever possible, should be construed to uphold its constitutional validity. *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32, *reh. denied*, 372 U.S. 961 (1963). Consequently, when the legislation at issue is subject to differing interpretations, this Court will favor a saving construction which renders the statute constitutional. *United States v. Vuitch*, 402 U.S. 62, 91 (1971). Likewise, when this Court has serious doubts about the validity of a particular statute, the Court will determine whether a construction of the statute, avoiding the constitutional question, is fairly possible. *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 841 (1986). In summary, this Court will exercise its power to review the constitutionality of a legislative act cautiously. *Regan v. Times, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion).

As will be shown, the conviction requirement of subsection 3 of Section 537.053, R.S.Mo. 1986, does not mandate constitutional invalidation. On its face, the statute does not compel self-incrimination.

B. SUBSECTION 3 OF SECTION 537.053, R.S.Mo. 1986, DOES NOT COMPEL SELF-INCRIMINATION.

Implicit in petitioner's constitutional challenge is the mistaken assumption that the Missouri General Assembly created a general cause of action for dramshop liability and then, by means of subsection 3, unconstitutionally narrowed it by indirectly requiring potential plaintiffs to waive their right against self-incrimination.

Rather, as held by the Supreme Court of Missouri, the conviction requirement constitutes an element of a plaintiff's right to bring a statutorily created cause of action for dramshop liability. *Simpson v. Kilcher*, 749 S.W.2d 386, 389 (Mo. banc 1988). As held by the Supreme Court of Missouri, the criminal

conviction requirement of subsection 3 is a reasonable restriction imposed by the Missouri General Assembly on a cause of action which that legislative body created. *Simpson*, 749 S.W.2d at 391.

It no way follows that the testimony of a prospective plaintiff is a prerequisite under Section 537.053, R.S.Mo. 1986, to either the cause of action for dramshop liability or the conviction of the dramshop keeper. Clearly, others could testify to the facts of the sale and, in the case of a minor, to the prospective plaintiff's age.

In the present case, petitioner did not have to give any statements to the police at all. On the night of his intoxication-related accident, he was accompanied by several friends to the bar in question. His friends alone could have provided the information necessary for the authorities to initiate a prosecution.

Petitioner's cited authorities do not authorize a Writ of Certiorari in the present case. For example, petitioner's citation to *Malloy v. Hogan*, 378 U.S. 1 (1964), is irrelevant. In *Malloy*, this Court held that an alleged gambler, ordered to testify before a state inquiry into alleged criminal activities, was entitled to invoke the privilege against self-incrimination. The facts before the Court in *Malloy* did not involve in any way a statute which even remotely violated the right against self-incrimination. Rather, the Court in *Malloy* focused on whether the Fourteenth Amendment prohibits state infringement of the right against self-incrimination just as the Fifth Amendment bars the federal government from denying the privilege. As just demonstrated, this Court's decision in *Malloy* has no bearing on the present case.

Likewise, petitioner's citations to *Lefkowitz v. Turley*, 414 U.S. 70 (1973), *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), and *Garrity v. New Jersey*, 385 U.S. 493 (1967), are equally inapplicable. In *Turley*, the statute subjected to constitutional scrutiny required public contracts to provide that if a contractor

refused to waive immunity or to testify concerning his state contracts, the contractor's existing state contracts could be cancelled. In *Cunningham*, the statute invalidated required a political party officer to testify concerning the conduct of his office. If the political officer refused, he could be divested of his office and prohibited from holding public office for five years. In *Garrity*, the statute at issue subjected police officers to the choice of forfeiting their jobs or waiving their right against self-incrimination.

In summary, the conviction requirement of subsection 3 of Section 537.053, R.S.Mo. 1986, imposes no similar coercive, threatening, or penalizing effect on the right against self-incrimination. To find a similar constitutional infirmity in the present case would do injustice to this Court's standard of review, namely, that a statute should be construed to uphold its constitutional validity whenever possible. *National Dairy Products Corp.*, 372 U.S. at 32. On its face, subsection 3 of Section 537.053, R.S.Mo. 1986, does not require self-incrimination for a plaintiff to state a cause of action for dramshop liability.

III. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE CONVICTION REQUIREMENT OF SUBSECTION 3 OF SECTION 537.053, R.S.Mo. 1986, IS SEVERABLE FROM THE REMAINING SUBSECTIONS OF THE STATUTE WHICH NONETHELESS BAR PETITIONER'S CAUSE OF ACTION.

A reviewing court will refrain from invalidating more of a statute than is necessary. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). Indeed, a reviewing court has the duty to maintain the constitutionality of a legislative enactment in so far as possible by separating the objectionable provisions from those found to be legally valid. *Id.* Consequently, a legal presumption rests in favor of severability. *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion).

In the present case, petitioner's self-incrimination challenge to Section 537.053, R.S.Mo. 1986, necessarily focuses on subsection 3 which creates a limited cause of action for dramshop liability and which requires a criminal conviction as a condition precedent to state a cause of action. Petitioner's argument ignores subsections 1 and 2 of the statute.

The provisions of subsections 1 and 2 are severable from subsection 3. They are therefore susceptible to constitutional enforcement without reference to subsection 3. In *Simpson v. Kilcher*, 749 S.W.2d 386, 393 (Mo. banc 1988), the Supreme Court of Missouri so held.

Specifically, Section 537.053, R.S.Mo. 1986, discloses two distinct legislative purposes. First and foremost is the prohibition of dramshop liability and the legislative abrogation of several appellate decisions which created common-law dramshop liability. This object is set forth in subsections 1 and 2. Second is the legislative creation of a limited cause of action conditioned on the conviction or suspended imposition of sentence of the dramshop keeper. This purpose is set forth in subsection 3.

Clearly, subsection 3 is severable from subsections 1 and 2. The standard for severability may be stated as follows: Unless it is evident that the legislature would not have enacted those provisions which are in its power, independently of those which are not, the invalid part may be dropped if the provisions which remain are fully operative as law. *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam).

In the present case, the Missouri General Assembly would have enacted subsections 1 and 2 independent of subsection 3. Subsections 1 and 2 demonstrate the Missouri General Assembly's determination to prohibit dramshop liability premised on common-law principles. The enactment of subsection 3, creating a limited, statutory cause of action, is in no way essentially or inseparably connected with the other provisions. It manifests an entirely different legislative purpose and is

therefore severable. For this reason, petitioner's cause of action is barred regardless of whether subsection 3 is constitutionally infirm or not. If subsection 3 is valid, it bars petitioner's cause of action in the present case. If subsection 3 is unconstitutional, subsections 1 and 2 nevertheless preclude his cause.

For these reasons, respondents respectfully request this Court to deny the Petition for a Writ of Certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Donald L. James
BROWN, JAMES & RABBITT, P.C.
705 Olive Street, Suite 1100
St. Louis, Missouri 63101
(314) 421-3400

Attorneys for Respondents

APPENDIX



APPENDIX

PLAINTIFF'S EXHIBIT 2

STATE OF MISSOURI)
)
COUNTY OF ST. LOUIS)

FIRST AFFIDAVIT OF JOHN F. MULLIGAN, JR.

COMES NOW John F. Mulligan, Jr., being of lawful age, having first been duly sworn upon his oath, and states that the following is true to the best of his knowledge, information and belief.

1. My name is John F. Mulligan, Jr. and at all times relevant to this Affidavit I have been an attorney licensed to practice law in the State of Missouri and I have represented Czongor Kozak, Mark Menendez and Michael Von Ruecker.

2. On December 22, 1986, and December 23, 1986, I had telephone conversations with Assistant Circuit Attorneys John Gruendler and Gary Randall of the Office of the Circuit Attorney for the City of St. Louis regarding prosecution of State liquor law violations occurring on or about December 17, 1986, in the City of St. Louis involving Holiday Inns, Inc. and Michael Von Ruecker. Mr. Gruendler and Mr. Randall said the case should be taken to the St. Louis Metropolitan Police Department for investigation and any appropriate action thereafter. I then contacted the St. Louis Metropolitan Police Department and I was informed that Detective Fred Husman was assigned the case.

3. On January 13, 1987, and February 5, 1987, I had telephone conversations with Detective Fred Husman during which he said Michael Von Ruecker and the two minors he was with at the Holiday Inn on or about December 17, 1986, had to

appear at the St. Louis Metropolitan Police Station and give statements and confessions before he would investigate the matter further. Detective Fred Husman said the three minors would be subject to arrest and prosecution for illegal possession of intoxicating liquor if they confessed to the offense.

4. On May 19, 1987, Czongor Kozak, Mark Menendez and Michael Von Ruecker appeared at the St. Louis Metropolitan Police Station, waived their constitutional rights against self-incrimination and confessed to unlawfully possessing intoxicating liquor at the Holiday Inn on or about December 17, 1986. They waived their constitutional rights only because no criminal prosecution would be brought against Holiday Inns, Inc. and Richard Fowler if they did not waive said rights.

/s/ John F. Mulligan, Jr.
John F. Mulligan, Jr. #34431
225 S. Meramec, Suite 525
Clayton, MO 63105
(314) 727-8910
Attorney for Plaintiff

Subscribed and sworn to before me this 14th day of June, 1988.

/s/ Kelly Cook
Notary Public

My Commission Expires:

April 5, 1991

